2013 Antitrust Merger Enforcement Update and Outlook

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Our 2012 Antitrust Merger Enforcement Update and Outlook reported on a number of emerging trends and initiatives by antitrust enforcers around the world. Enforcers in the United States and Europe continue efforts to block proposed transactions, as demonstrated by an increase in the number of court cases brought by the U.S. agencies and prohibition decisions adopted by the European Commission. Although the litigation and prohibition decisions occur in a small percentage of transactions reported to the authorities, the aggressive use of these measures in the United States and Europe raises the stakes for parties involved in merger reviews. Antitrust merger enforcement is also increasingly an international affair. Over the past year, competition authorities in a number of jurisdictions closely coordinated their investigations of a number of high-profile transactions, a development that presents unique complexities and challenges for parties planning transactions involving international businesses. This Update reviews these and other significant trends and developments over the past year.

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THE UNITED STATES

Over the past two years, the U.S. antitrust enforcement authorities have continued their aggressive scrutiny of mergers across all sectors of the economy. Both the U.S. Department of Justice, Antitrust Division (“DOJ”), and the Federal Trade Commission (“FTC” or “Commission”) (collectively “the agencies”) will have new leadership in 2013, with William Baer serving as DOJ’s Assistant Attorney General and Edith Ramirez as the Chairman of the FTC. We do not expect AAG Baer and Chair Ramirez to reduce the agencies’ high level of merger enforcement, and the DOJ could increase the number of cases that it brings if AAG Baer is less willing than his immediate predecessors to agree to complex behavioral remedies. In 2010 and 2011, these behavioral remedies enabled the DOJ to resolve challenges to several substantial vertical mergers without litigation.

Reportable M&A Transactions Increase and High Enforcement Levels Continue

The volume of merger and acquisition transactions subject to the Hart-Scott-Rodino (“HSR”) Act continues to recover from the depths of the financial crisis. The number of transactions reported under the HSR Act has more than doubled since fiscal year 2009 (from 716 to 1,450 annually), increasing 65% between fiscal year 2009 and fiscal year 2010, and increasing another 25% between fiscal year 2010 and fiscal year 2011. While the volume of HSR Act-reportable M&A transactions remains lower than before the 2008 financial crisis, the substantial increase in HSR Act filings over the past two years shows a significant recovery in the number of reportable transactions, which seems likely to continue. The agencies have not released the number of HSR Act-reportable filings in fiscal year 2012, but the number of filings in fiscal year 2012 is expected to be similar to the number of filings in fiscal year 2011.

The FTC and DOJ under the Obama administration have issued “second requests,” that is, subjecting transactions to in-depth formal investigations, at a substantially higher rate than under the previous administration. The percentage of HSR Act-reportable transactions subject to a second request was 4.5% in fiscal year 2009, the highest rate in a decade. And although it dropped a bit in fiscal year 2010, the percentage of second requests remained a robust 4.1% in fiscal year 2010 and fiscal year 2011. While the agencies have not yet published statistics for fiscal year 2012, we expect that these statistics will resemble the level of enforcement in the previous two years. In addition, over the past several years, the FTC and DOJ appear to have increased significantly investigations of “below the radar” transactions to which HSR Act reporting does not apply, a trend that appears to have continued.

Transactions Reported Under HSR Act
FY 2002–2011

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Enforcement rates also have risen compared to historical levels. In fiscal year 2010 and fiscal year 2011, the FTC and DOJ challenged a total of 78 transactions, whereas the agencies challenged only 71 transactions during part of the last two years of the Bush administration coinciding with fiscal years 2007 and 2008. In other words, the agencies challenged more transactions in fiscal year 2010–2011 when merger and acquisition activity slowed in the wake of the financial crisis than they did in the last two years of the Bush administration when pre-crisis merger and acquisition activity was at its peak. While the agencies have not made enforcement statistics available yet for fiscal year 2012, we expect the same relatively high levels, although in keeping with the past, the vast majority of HSR Act-reportable transactions are not subject to enforcement.

The Agencies Continue to Pursue Aggressive Merger Litigation Strategy

The numbers tell only part of the story. Over the past two years, the agencies have stepped up their litigation efforts, challenging or threatening to challenge more transactions in the courts than at any time since the Obama administration took office. As we reported in our 2012 update, the agencies successfully blocked a number of transactions in recent years either by securing a court-ordered injunction (H&R Block/2SS), causing the parties to abandon their transaction during litigation (AT&T’s bid for T-Mobile), and by informing the companies that they would file a lawsuit if the parties did not cancel their deal (NASDAQ’s bid for NYSE).

This trend has continued over the last year. For example, in December 2011, Avery Dennison agreed to sell its Office and Consumer Products Group to 3M for approximately $550 million. Following an eight-month investigation, the DOJ informed the parties in September 2012 that it would file a civil lawsuit to block the deal, and shortly afterward the parties announced that they had abandoned the transaction. The DOJ’s press release claimed that “[t]he proposed merger would have given 3M more than an 80 percent share of both the U.S. labels and sticky notes markets” and that Avery was 3M’s “closest competitor in the sale of adhesive-backed labels and sticky notes.” The DOJ also continues to pursue court cases against consummated mergers, such as DOJ’s recent challenge to Bazaarvoice’s acquisition of rival PowerReviews.

The FTC has also actively used litigation to block proposed mergers and unwind allegedly anticompetitive consummated mergers during 2012, including the following four transactions in the health care services sector:

1. In FTC v. Phoebe Putney Health System, Inc. (discussed below), the FTC prevailed in a significant Supreme Court case about the state action doctrine as applied to a hospital merger. As a result of the decision, the FTC appears likely to succeed in its case against the merger.

2. The FTC successfully challenged in court OSF Healthcare System’s proposed acquisition of Rockford Health System, alleging that the transaction would reduce the number of hospitals systems in the Rockford, Illinois region from three to two and give the combined system 64% of general acute-care inpatient services in the area. In April 2012, a U.S. District Court granted the FTC’s request for a preliminary injunction and the parties then abandoned the transaction.

3. In November 2012, Reading Health System abandoned its proposed acquisition of the Surgical Institute of Reading, a physician-owned surgical specialty hospital, after the FTC filed suit to enjoin the transaction alleging that post-merger market shares ranging from 49 to 71 percent across a range of surgical services.

4. In March 2012, after several years of litigation, the FTC succeeded in unwinding ProMedica Health System’s 2010 acquisition of rival St. Luke’s Hospital.

In December 2012, the FTC filed a complaint seeking to stop Integrated Device Technology’s acquisition of PLX Technology. According to the FTC, the merger would give the combined firm a "near monopoly" in the market for PCIe switches, a type of integrated computer circuit that is widely used in commercial and consumer computer equipment. Integrated Device Technology and PLX abandoned the transaction in response to the FTC challenge.

The agencies’ recent string of courtroom victories, combined with their greater emphasis on bolstering their litigation capabilities, makes it more likely than ever that they will aggressively challenge in court transactions that they believe are anticompetitive, and that they are unlikely to accept "weak" remedies to avoid litigation. Indeed, in the first several weeks of his tenure, AAG Baer challenged the Anheuser-Busch InBev’s efforts to purchase full control of Grupo Modelo, rejecting the parties’ proposed vertical remedy (discussed below). Parties to transactions that are likely to raise significant antitrust issues should account for this dynamic by developing a litigation strategy well before the reviewing agency makes a final enforcement decision.
DOJ Sues to Block $20 Billion Beer Merger: United States v. Anheuser-Busch InBev

The DOJ's challenge to the Anheuser-Busch InBev ("ABI")/Grupo Modelo transaction illustrates the DOJ's aggressive litigation strategy. On January 31, 2013 the DOJ filed a civil complaint in the U.S. District Court for the District of Columbia seeking to enjoin ABI's proposed acquisition of Grupo Modelo. ABI currently owns a partial stake in Modelo and its operating subsidiary, but does not have "effective control" of Modelo.

DOJ's Allegations

The DOJ's complaint alleges that the merger "threatens competition by combining the largest and third-largest brewers of beer in the United States." According to the DOJ, even though ABI has a partial ownership interest in Modelo, Modelo functions as an independent competitor. DOJ alleges that the merger would reduce competition by enhancing coordinated pricing behavior among the remaining competitors, and reducing innovation and product variety. Notably, DOJ's complaint cites more than 40 quotes from the parties' internal documents in support of its claim that Modelo was an aggressive competitor that ABI was seeking to eliminate.

The complaint alleges that the merging parties together account for about 46% of all beer sales in the United States (ABI with 39% and Modelo with 7%). MillerCoors ("Miller"), the second-largest competitor, has an estimated 26% market share. The only other competitor mentioned by name is Heineken USA Inc., with 6% share; the remaining 22% of the U.S. market is attributed to "fringe competitors," including craft brewers. The complaint also alleges there are the U.S. beer market is characterized by high entry barriers, including the costs of facilities and building distribution networks, and that the deal will not produce any cognizable efficiencies. Notably, the complaint alleges both a national relevant geographic market and 26 local geographic markets, all of which DOJ maintains are concentrated. According to the DOJ, the Herfindahl-Hirschman Index ("HHI") measurements of concentration indicate that the merger will presumptively have anticompetitive effects in 26 of the 26 local markets in which the parties' compete.

DOJ asserted that ABI's proposed remedy was insufficient because it merely created a "façade of competition between ABI and its importer" (Crown). "In reality," according to DOJ, the transaction eliminates Modelo from the market—a particularly aggressive competitor—and replaces it with an entity wholly dependent on ABI. "Because Crown would not have its own brewing facilities, DOJ asserted that Crown was "fully dependent" on ABI for its supply of beer and would essentially be a "business partner" rather than a competitor.

DOJ's case appears to rely heavily on evidence of the parties' and their competitors' past pricing behavior. According to DOJ, ABI and Miller often find it more profitable to follow each other's prices than to compete aggressively for market share through discounting or price cuts. DOJ alleged that ABI's strategic plans demonstrate that ABI's pricing strategy involves initiating annual price increases with public announcements with the expectation that Miller will follow, which Miller usually did.

In contrast, DOJ alleged that Modelo's pricing strategy is quite different from Miller's. Although Modelo's prices tend to be higher than ABI's, in recent years Modelo sought to narrow the price gap between certain Modelo beers (Corona and ABI's beers (such Bud and Bud Light) by pursuing a strategy that posed a direct threat to ABI's "price leadership." DOJ maintained that ABI and Miller were forced to lower their prices and innovate (by offering new products) in order to counter Modelo's threat. DOJ posits that the proposed transaction would remove a significant competitive constraint, allowing ABI to execute its price leadership strategy and leaving consumers with higher prices, less innovation, and fewer products to choose from.

ABI's Proposed Remedy

The DOJ is seeking to block the ABI/Modelo transaction because it concluded that the divestiture of Modelo's interest in Crown, even when coupled with ABI's offer of a 10-year beer supply contract, would be insufficient to preserve the existing level of competition in the U.S. beer industry. As ABI/Modelo demonstrates, the DOJ continues to demand "structural" remedies in horizontal mergers. To address the DOJ's concerns, ABI recently offered to sell a brewery to Crown, along with offering Crown a perpetual license to Modelo's brands. In response, DOJ agreed to stay the litigation until March 19. It appears that the DOJ and the parties will be negotiating the terms of the new remedy proposal over the next few weeks.

As we reported in our 2012 update, DOJ issued a new Policy Guide to Merger Remedies in 2011, which signaled more expansive use of so-called conduct remedies, such as supply agreements, particularly in the context of vertical mergers. It remains to be seen whether AAG Baer will continue the practice of his immediate predecessors of agreeing to complex conduct remedies to settle challenges to vertical mergers, such as the NBC/Comcast transaction.

Unanimous Supreme Court Rejects Application of State-Action Immunity to Hospital Merger: FTC v. Phoebe Putney Health System, Inc.

The FTC maintained its recent winning streak in hospital merger litigation by successfully persuading the Supreme Court that the state-action doctrine (otherwise known as the "Perker doctrine") did not apply to a merger between rival Georgia hospitals. The case involved a merger between two hospitals in Albany County, Georgia, which together account for 86% of the market for acute-care hospital services provided to commercially insured patients in Albany and the surrounding counties. The FTC sought to enjoin the merger in federal district court in Georgia. The district court dismissed the FTC's complaint on state-action grounds, and the FTC appealed the district court's decision to the Eleventh Circuit.

On the facts alleged in the complaint, the court of appeals agreed with the FTC that the joint operation of the two hospitals "would substantially lessen competition." The court then examined the question of whether the state-action doctrine nevertheless immunized the merger from antitrust scrutiny because it was a foreseeable result of state policy. For state-action doctrine to immunize an otherwise anticompetitive merger, (1) the challenged transaction must have been undertaken pursuant to a "clearly articulated and affirmatively
expressed state policy' to replace competition with regulation,” and (2) “the policy must be ‘actively supervised’ by the state itself.”[1] After reviewing the record, the court of appeals upheld the district court's decision to dismiss the FTC's case on the state-action grounds because one of the merging hospitals was controlled by a local hospital authority established by Georgia law. In the court's view, the alleged anticompetitive merger was a "foreseeable" result of Georgia legislation empowering the hospital authority to acquire assets, including hospitals.

A unanimous Supreme Court reversed. Writing for the Court, Justice Sotomayor observed "there is no evidence the state affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Because the Court's "case law makes clear that state-law authority to act is insufficient to establish state-action immunity," the burden is on the merging party to "show that it has been delegated authority to act or regulate anticompetitively." But in the Court's view the Georgia law at issue "does not clearly articulate and affirmatively express a state policy empowering the [hospital authority] to make acquisitions that will substantially lessen competition."

Although the Court's decision grapples with a unique set of facts, *Phoebe* provides a degree of support for the FTC's long-standing efforts to reduce the breadth of certain antitrust immunities. The Court reaffirmed the principle that "state-action immunity is disfavored" in part because "federalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'" Although this language will surely be cited by the FTC and other antitrust plaintiffs going forward, it remains to be seen whether and to what extent *Phoebe* will apply beyond its facts.

**Court of Appeals Weighs in on Potential Competition: Polyvore International, Inc. v. Federal Trade Commission**

In February 2008, Polyvore International acquired rival battery separator producer Microporous Products. Six months after the merger closed, the FTC issued a complaint alleging that the transaction violated Section 7 of the Clayton Act and Section 5 of the FTC Act. After a four-week hearing, the FTC administrative law judge ("ALJ") issued an extensive opinion holding that the transaction was "reasonably likely to substantially lessen competition" in four relevant markets involving certain types of battery separators, and the ALJ ordered the divestiture of all the acquired assets. In December 2010, the Federal Trade Commission unanimously upheld the ALJ's decision, including the ALJ order requiring Polyvore to divest all the assets and businesses that it acquired through the transaction.

Polyvore appealed to the Eleventh Circuit, which in July 2012 upheld the FTC's decision and remedy (Polyvore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)). The central issue on appeal was whether the FTC "erred when it analyzed the acquisition as a horizontal merger by treating Microporous as an actual competitor in the SLI ["starting, lighting, and ignition"] separator market rather than as a potential competitor." The court upheld the FTC's decision, noting that although Microporous had yet to sell SLI separators, it had started manufacturing them and was marketing SLI separators to several potential customers. Most importantly, according to the court of appeals, the record demonstrated that Polyvore viewed Microporous as a serious competitive threat, had made price concessions, and took other actions in reaction to Microporous' overtures to customers. In light of this holding, the court concluded that the FTC properly characterized the parties as actual competitors, not merely potential competitors.

*Polyvore* demonstrates the complexities associated with evaluating the competitive effect of mergers between an incumbent and a recent or potential market entrant. While the court of appeals held that, based on the record before it, the merging parties should be viewed as "actual" rather than "potential" competitors, it may have reached a different conclusion based on slightly different facts. As we have written in the past, the 2010 Merger Guidelines address potential competition in ways that appear to be at odds with the relevant case law. However, it remains unclear whether the treatment of potential competition in the Merger Guidelines would be upheld in court. *Polyvore* does not resolve this question.

**FTC Continues Aggressive Enforcement in Pharma Transactions**

The FTC continued to aggressively investigate transactions in the pharmaceutical sector, requiring the parties in the Watson/Actavis and Novartis/Fougera transactions to give up the rights to market certain products as a condition for clearing the deals. These actions were on top of three other pharmaceutical and medical device transactions for which the Commission required remedies in 2012.

These recent examples are in line with the traditionally high level of merger enforcement in the pharmaceutical sector. Merger investigation data released by the FTC in January 2013 reveals that, between FY1996 and FY2011, a very high percentage of pharmaceutical-industry transactions that were subject to a Second Request result in some form of enforcement (either a consent decree or abandonment by the parties). Indeed, the FTC took enforcement action to remedy purported competitive issues in 119 out of 122 alleged relevant pharmaceutical markets it investigated at the second request stage (a rate of 97.5%) over the 15-year time frame.

**FTC and DOJ Weigh in on Standard Essential Patents in the Context of Merger Reviews**

Over the past year, the FTC and DOJ have stepped up scrutiny of conduct involving standard-essential patents ("SEPs"), which has extended to the context of merger reviews. The FTC’s complaint and consent order in the Bosch-SPX merger review and the FTC and DOJ investigations into the Google-Motorola merger, as well policy statements made by both agencies, illustrate the agencies’ willingness to investigate and seek remedies in transactions where one or both parties own SEPs.

In June 2012, the FTC expressed its concern about exclusion orders issued in matters involving reasonable and nondiscriminatory ("RAND" or "FRAND")-encumbered SEPs, where infringement is based on implementation of standardized technology in statements to the United States International Trade Commission ("ITC"). In its Statements on the Public Interest in response to the ITC's requests in two investigations, *In the Matter of Certain Wireless Communication Devices and In the Matter of Certain Gaming and Entertainment Consoles*, the FTC described the value of standard setting in the patent process, and explained that RAND commitments mitigate the risk of patent hold-up and encourage investment in the standard. The FTC went on to note, however, that high switching costs combined with the SEPs owner's threat to obtain an exclusion order against others "may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives"—a result that "could raise prices to consumers while undermining the standard setting process." Thus, the FTC encouraged the ITC to consider the unique risks posed by RAND-encumbered SEPs and consider "remedies that reduce the chance of patent-hold up," i.e., remedies other than exclusion orders.

The DOJ voiced similar concerns in its January 8, 2013 joint Policy Statement, issued with the U.S. Trademark and Patent Office ("USTPO"). While the statement rejected a general ban on SEP owners seeking exclusion orders or injunctions against others, the agencies asserted that
"[I]n some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest” and "may harm competition and consumers.” In particular, the statement suggested that it may not be appropriate for a court to issue an injunction or exclusion order at the behest of a SEP owner where such relief based on a FRAND-encumbered patent appears to be incompatible with the terms of a patent holder’s existing FRAND licensing commitment to a standard-setting organization.

In the Bosch and Google matters, the agencies demonstrated their willingness to further these policies through investigations and merger reviews, even where the alleged anticompetitive conduct arising in connection with the SEPs is unrelated to the merger itself.

**Bosch’s Acquisition of SPX Service Solutions**

On November 21, 2012, the FTC issued a complaint alleging that Bosch’s proposed $1.15 billion acquisition of SPX Service Solutions U.S. LLC violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The FTC charged that the acquisition would give Bosch a virtual monopoly in the market for air-conditioning recycling, recovery, and recharge devices. The complaint also alleged harm arising from SPX’s conduct involving its SEPs, which was wholly unrelated to the merger. The FTC alleged that as a member of a standard-setting organization (“SSO”), SAE International, SPX agreed to abide by SAE rules that require companies to license their SEPs on FRAND terms, but SPX breached this commitment by pursuing injunctions against willing licensees of those patents. Namely, the FTC’s complaint asserted that SPX harmed competition in the market for this equipment by reneging on its commitment to license SEPs on FRAND terms.

To address the FTC’s concerns regarding SPX’s alleged misconduct involving its SEPs, the FTC’s proposed settlement requires Bosch to refrain from seeking injunctive relief against firms that require a license for the SEPs and to make them available on a royalty-free basis to companies implementing the relevant SAE standards. The statement of the Commission, which voted 3-2 in favor of the proposed order, explained that "the threat of injunctive relief in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation,” quoting its unanimous June 2012 statements to the ITC. The FTC went on to find that, "[b]y threatening to exclude standard-compliant products from the marketplace, a SEP holder can demand and realize royalty payments that reflect the investments firms make to develop and implement the standard, rather than the economic value of the technology itself. This can harm incentives to develop standard-compliant products. The threat of an injunction can also lead to excessive royalties that can be passed along to consumers in the form of higher prices.” "Patent holders,” said the FTC, "should understand that in appropriate cases the Commission can and will challenge” such conduct with "a stand-alone Section 5 unfair methods of competition claim."

In a strongly worded dissent, Commissioner Ohlhausen argued that "[s]imply seeking injunctive relief on a patent subject to [FRAND] license, without more, even if such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method competition or an unfair act or practice under Section 5.” Ohlhausen expressed a number of concerns with the majority’s ruling, including that it effectively ousted federal district courts and the ITC from their roles in addressing SEP enforcement issues in pending litigation, and also that the majority’s use of the FTC’s Section 5 authority lacked "meaningful limiting principles.”

**Google’s Acquisition of Motorola Mobility Holdings, Inc.**

The DOJ’s investigation of Google’s acquisition of Motorola Mobility and other transactions involving acquisitions of SEP portfolios, including separate SEP acquisitions by Apple and Microsoft, demonstrate the agencies’ continuing focus on whether mergers give the acquirers of such patents the incentive or ability to exploit ambiguities in FRAND licensing commitments in ways that may harm competition. The DOJ concluded that Apple’s and Microsoft’s acquisitions were unlikely to substantially lessen competition, pointing to commitments made by the acquiring firms concerning their SEP licensing policies. Apple and Microsoft, according to the DOJ, made "clear commitments” to license their SEPs on FRAND terms and not seek injunctions in disputes involving SEPs. In contrast, the DOJ stated that "Google’s commitments were more ambiguous,” especially with respect to its policy regarding injunctive relief. While the DOJ determined that Google’s acquisition of Motorola did not threat to substantially lessen competition, it noted that “how Google may exercise its patents in the future remains a significant concern.”

Notably, the FTC later investigated and issued a complaint against Google alleging that Motorola breached certain FRAND commitments involving SEPs relating to smartphones, tablet computers, and video game systems. The FTC claimed that this conduct violated Section 5 of the FTC Act by impairing competition in certain markets for downstream electronic devices.

The FTC’s settlement order involving Google’s SEP’s practices required Google to withdraw its claims for injunctive relief on FRAND-encumbered SEPs, and to offer a FRAND license to any company that wants to license Google’s SEPs in the future. The order also provides for a complex procedure for resolving FRAND-related licensing disputes between Google and prospective licensees.

In its statement accompanying the order, the Commission majority noted that “the Proposed Order may set a template for the resolution of SEP licensing disputes across many industries, and reduce the costly and inefficient need for companies to amass patents for purely defensive purposes in industries where standard-compliant products are the norm.” Expanding on its language in the Bosch statement, the majority’s statement argued that the threat of an injunction or exclusion order constitutes "patent ambush" that "harms competition and consumers and is rightly condemned by the Commission.”

In a separate statement Commissioner Rosch, joined by Commissioner Ohlhausen in her dissent, disagreed with the Commission’s decision to invoke a stand-alone unfair methods of competition claim under Section 5 “because it is not clear what the ‘limiting principles’ of such a claim would be.”

**International Coordination Plays Increasingly Prominent Role in DOJ and FTC Merger Reviews**

In recent years, the FTC and DOJ have continued to implement policies designed to allow the agencies to more closely coordinate their merger reviews with antitrust authorities outside the U.S. As we reported in our 2012 update, the agencies recently amended their memorandum of understanding (“MOU”) with the European Commission, and entered new bilateral agreements with the antitrust authorities in China and Chile. In addition, in September 2012, the DOJ, FTC, and Competition Commission of India executed a MOU that creates a general framework for cooperation on enforcement and policy matters.

The greater degree of international cooperation had a measurable impact on the timing and outcome of several transactions over the past year, a trend that is expected to continue. Transacting parties should understand the significance of the increase in such collaborations and be aware of the challenges—and potential benefits—that the increasingly global scope of merger enforcement might pose.
On September 14, 2012, Joseph Wayland, then the Acting Assistant Attorney General at the DOJ, gave a speech highlighting recent DOJ enforcement actions that featured cooperation with the DOJ's counterparts in other jurisdictions. In doing so, he identified three principal purposes of increased international cooperation: (1) increasing the Division's understanding of the competitive process, (2) increasing the effectiveness of global merger enforcement activities, and (3) increasing the efficiency, both for consumers' and merging parties' benefit, of global competition enforcement efforts.

The Acting AAG's noted the Division's close cooperation with the European Commission during the Google/Motorola Mobility investigation, [2] which culminated not only in both the DOJ and the European Commission announcing their decisions on the same day, but also in each authority reaching the same conclusion to clear the transaction based largely on the same substantive analysis. The DOJ also worked closely with the enforcement agencies in Australia, Canada, Israel, and Korea during the course of the Google/Motorola Mobility investigation. As explained above, the merger transaction involved the parties' use of standard essential patents, and the widespread use of the transaction meant that any remedy would a global dimension.[3]

As a second example of international cooperation in a merger investigation, the Acting AAG pointed to the DOJ's international cooperation efforts and their impact on the DOJ's review of the United Technologies/Goodrich transaction, which was the largest transaction (as measured by dollar value) in the aircraft industry's history. Because of the scale and global dimension of the aircraft industry, any remedy imposed by one competition authority would have an impact well beyond the reach of its jurisdiction. After substantial behind-the-scenes negotiations and discussions, the DOJ, European Commission, and Canadian Competition Bureau each announced a "coordinated remedy" on the same day, which addressed all three agencies' substantive concerns with the transaction.

The Acting AAG further noted that effective international cooperation requires close the authorities to coordinate efforts and exchange confidential information regarding the parties and the transaction. To facilitate exchanges, the DOJ encourages parties to merger investigations to agree to waiver letters allowing agencies to share information with one another. And aside from discussions of specific merger investigations, the Acting AAG also noted how the Division worked to further international cooperation generally to promote efficiency of competition law enforcement, contributing along with the FTC and European Commission to the release of the newest version of the Best Practices on Cooperation in Merger Investigations in October 2011. Overall, the speech clarified DOJ's position that, as long as the global economy continues becoming more interconnected, the future "will require an increased commitment to international cooperation efforts" and that such a commitment "will help consumers, competition and businesses."

International coordination has also had an impact on FTC merger reviews. In its 2012 annual report, the FTC noted that, in addition to signing a "landmark" Memorandum of Understanding with China's competition agencies, on the merger investigation front the FTC staff had cooperated with 10 foreign jurisdictions during the review of Western Digital's proposed acquisition of Hitachi Global Storage Technologies. Specifically, the FTC noted in its press release in connection with the report that it had worked both on the investigation and in formulating potential remedies with agencies in Australia, Canada, China, the EU, Japan, South Korea, Mexico, New Zealand, Singapore, and Turkey.

Not all transactions involve industries with an international or global dimension. However, transactions that are notified in multiple jurisdictions are now routinely subject to a coordinated approach by antitrust and competition authorities around the globe. Increased coordination between reviewing agencies reduces the risk of conflicting remedies and outcomes for global merger review.

This is certainly a welcome development for transacting parties, but it also presents unique challenges and complexities. One challenge is that although antitrust enforcers have made coordination a priority, specific protocols regarding behind-the-scenes interagency communications and coordination remain opaque. In particular, aside from encouraging parties to time their filings so as to allow the agencies to meaningfully collaborate, the agencies have provided no specifics regarding the circumstances in which one reviewing agency may delay a decision to clear a merger or accept a remedy to allow another agency time to complete its investigation. Merger review timetables in jurisdictions such the United States, European Union, and China can vary significantly. Because of this variation and the commitment of some authorities to coordinate timing, slow progress in one jurisdiction could delay otherwise warranted clearance decisions or other resolutions in other jurisdictions.

Additional guidance and transparency from the agencies is needed for transacting parties to fully understand the implications of ever-increasing international coordination efforts. For the time being, transacting parties, working closely with antitrust counsel, should consider these new and important developments in planning the expected timing of the overall merger review process.

THE EUROPEAN UNION

The Numbers: The Trend Toward Greater Scrutiny

Despite the crisis in the Eurozone, 2012 has been an eventful year in merger enforcement. Based on European Commission data, 283 merger transactions were notified to the Commission throughout calendar year 2012. Although nowhere near the peak of 402 notified mergers in 2007, the most recent figures are higher than those for calendar years 2009 and 2010 and only slightly below those of 2011.

Despite the challenging economic climate throughout the EU, the trend toward greater scrutiny of mergers, as indicated in our 2012 Antitrust Merger Enforcement Update and Outlook, has been reinforced by recent events. In a recent speech, Competition Commissioner Almunia warned against industrial policy considerations intruding into EU merger analysis, when he indicated that "[w]hat we must avoid are attempts to shield Europe's companies from competition, in particular during this harsh period of the economy. In this game, only a few of them will benefit, and the majority will lose. I will firmly react against these temptations. Merger control is not the place for protectionist measures."[4]

The overall trend in 2012 has been for the European Commission to be increasingly comfortable about initiating in-depth ("Phase II") investigations. During 2012, the Commission adopted ten Decisions initiating Phase II proceedings, more than those issued during 2011 (eight) and double those issued in 2009 (five) or 2010 (four). Over the past three years, the rate at which M&A transactions notified to the European Commission trigger a Phase II investigation has nearly tripled, from 1.19% in 2010 to 3.53% in 2012.

In addition, the willingness of the European Commission to close Phase II investigations without issuing a Statement of Objections ("SO"), a trend which we highlighted in our 2012 update, seems to have come to an end in 2012. As we explained in our 2012 update, among the ten mergers that had been subject to Phase II review in 2011, the Commission cleared four unconditionally (namely; the Votorantim / Fischer JV, UPM-Kymmene / Myllykoski, Caterpillar / MWM, and Samsung / Seagate Technology). In contrast, in light of the Decisions issued by the European Commission in 2012, it appears this trend has come to an abrupt end. In 2012, the Commission issued an SO in a number of high-profile Phase II reviews (e.g., Deutsche Börse / NYSE, Johnson and Johnson / Synthes, Südzucker/ED&F MAN, Universal / EMI, Outokumpu/Inoxum, Hutchison/Orange Austria and UPS/TNT EXPRESS). The issuance of an SO, often leads to the Commission to demand divestitures as a condition to clearance (e.g., Johnson and Johnson / Synthes, Südzucker/ED&F MAN, Universal/EMI, Outokumpu/Inoxum and Hutchison / Orange Austria). And, in cases where the transacting parties did not present the Commission with a remedy that satisfies its concerns, the Commission has shown a willingness to adopt a prohibition Decision (refer to cases Deutsche Börse/NYSE, UPS/TNT EXPRESS or Ryanair/Aer Lingus) blocking the transaction altogether.
Two exceptions to this general trend regarding Phase II investigations include: (i) the Commission’s authorization of the acquisition by the United Technologies Corporation of the Goodrich Corporation, which the Commission cleared without issuing an SO, where the parties agreed to a number of remedies, including the divestiture of Goodrich’s businesses in aircraft electrical power generation and distribution systems and of Goodrich’s business in engine controls for small aircraft engines; and (ii) the Commission’s unconditional clearance of a U.K. mobile commerce JV between the mobile operators Telefonica, Vodafone and Everything Everywhere (itself created by the merger of T-Mobile UK and Orange U.K. in 2010), without the Commission issuance of an SO despite initial concerns that the JV parties, three of the four active U.K. mobile operators, would have the power to exclude smaller competitors. In particular, the Commission’s market investigation revealed that a number of alternatives already existed to the JV’s services, and that many more were likely to emerge in the near future so as to ensure adequate competitive pressure on the JV’s mobile payments activities.

Furthermore, it should be noted that the greater level of scrutiny by the Commission has not impeded its grant of unconditional clearance to transactions involving U.S. corporations such as Procter & Gamble, the brewing company Molson Coors and the snack business of Pringles (acquired by the Kellogg Company). In addition, on 13 February 2012, as noted in our 2012 Antitrust Merger Enforcement Update and Outlook, the Commission granted unconditional clearance to the acquisition of Motorola Mobility by Google, although in doing so the Commission voiced certain concerns about the merged entities’ future IP licensing practices. Similarly, a number of transactions were also cleared unconditionally despite the Commission’s resort to relatively sophisticated theories of harm, including both vertical and conglomerate effects, namely: Vodafone Group / Cable Wireless Worldwide, Cisco Systems / NDS Group and Sanofi-Aventis / Genzyme.


UPS’s Proposed Acquisition of TNT Express

The Commission decided to open an in-depth investigation into the merger based on its serious concerns regarding the level of concentration in markets for small parcel delivery services and, in particular, for international express services. On 30 January 2013, the Commission issued a Press Release announcing the prohibition of the proposed transaction. The Commission noted that the transaction would have reduced the number of significant players to three (or two) in the alleged relevant markets for the express delivery of small packages to another European country, thereby adversely affecting customers. Commissioner Almunia expressed concerns, in particular, in relation to the need, for “many businesses active in the EU Single Market, to send small packages to another European Country with Guaranteed Delivery on the next day.” The Commission explained that the remedies UPS had offered—including divestitures and allowing a new competitor access to its air network—were insufficient to address its competitive concerns. In particular, the Commission was concerned that the purchaser of the divested assets would not be in a position to restore competition lost through the merger.

The Proposed Takeover of Aer Lingus by Ryanair

On 27 February 2013, European Commission prohibited the proposed takeover of the Irish flag carrier Aer Lingus by the low-cost airline Ryanair. According to the Commission, the acquisition would have combined the two leading airlines operating from Ireland. The Commission concluded that the merger would have harmed consumers by creating a monopoly or at least a dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete vigorously against each other. The Commission apparently took into account the changes in market circumstances since 2007; e.g., the fact that the market positions of Ryanair and Aer Lingus appear to have become even stronger, with their combined market shares going up from 80% in 2007 to 87% in 2012 for short-haul flights out of Dublin. According to the Commission, the number of routes to and from Ireland operated in competition between Ryanair and Aer Lingus has increased from 35 in 2007 to 46 in 2012.

During the merger review investigation, Ryanair offered several remedy packages, the last of which involved the proposed divestment of 43 routes to “Flybe” and the abandonment of three take-off and landing slots to the ‘International Airlines Group’. Flybe and the International Airlines Group committed to operate these routes for three years. Nevertheless, the Commission found that the remedies would not be sufficient to address the “magnitude of the competition concerns raised.” In the words of Commissioner Almunia:

"The Commission’s decision protects more than 11 million Irish and European passengers who travel each year to and from Dublin, Cork, Knock and Shannon. For them, the acquisition of Aer Lingus by Ryanair would have most likely led to higher fares. During the procedure, Ryanair had many opportunities to offer remedies and to improve them. However, those proposals were simply inadequate [...]”

Ryanair has since stated that it will appeal what the company referred to as a “political” decision by the Commission.

It should be noted that this is the third time that the proposed acquisition of Aer Lingus by Ryanair was notified to the Commission. In 2007, the Commission prohibited Ryanair’s first attempt to acquire Aer Lingus, a decision which was upheld by the EU General Court. In 2009, Ryanair withdrew its second notification.

Deutsche Börse/NYSE

As indicated in our 2012 Antitrust Merger Enforcement Update and Outlook, on 1 February 2012 the Commission decided to block the planned merger between Deutsche Börse and NYSE. In that case, it was concluded that the transaction would lead to a quasi-monopoly in the market for European financial derivatives traded globally on exchanges.

Deutsche Börse and NYSE controlled over 90% of financial derivatives on the European market. According to the Commission, this high combined market share would have made it very difficult for actual or potential competitors to enter the market and to pose a credible competitive threat to the merged entity. The remedies offered by the parties were deemed to be insufficient to eliminate the Commission’s competition concerns. Deutsche Börse alone (i.e., without NYSE) decided to lodge an appeal before the General Court on 12 April 2012 against the prohibition Decision.

High-Profile Phase II Investigations Leading to Divestitures in 2012

Johnson & Johnson/Synthes

The merger between Johnson & Johnson and Synthes involved various orthopaedic medical devices (i.e., trauma devices, spine devices, shoulder replacement devices and cranio-maxillofacial devices). The Commission explained in its Press Release that its investigation had
highlighted a number of competition concerns in alleged markets for trauma devices across various Member States especially taking into account "the very high combined market shares of the merging entities, the rather mature character of the products and the strong position of the AO Foundation, a highly reputed Swiss-based manufacturer of implants with an exclusive relationship with Synthes." The Commission concluded that surgeons were reluctant to switch suppliers of trauma devices, thereby raising barriers to entry in the relevant markets. In response to an SO issued on 25 January 2012, Johnson and Johnson offered commitments to the Commission to divest its entire trauma business in the EEA, in a bid to ensure that there would be no overlap in this particular alleged market.[6]

Universal Music Group ("Universal")/EMI (Recorded Music Business)

According to the Commission's Press Release, the transaction would bring together two of the three so-called major record companies. The Commission concern was that, following the acquisition, Universal would enjoy "excessive market power vis-à-vis its direct customers" who sell physical and digital recorded music at the retail level. The Commission is said to have found that the transaction would have increased Universal's size in a way that would likely have enabled it to impose higher prices and more onerous licensing terms on digital music providers, such as Apple's iTunes and Spotify.

The Commission's position contrasts with that of the US FTC which, on the same day (i.e., on 21 September 2012) decided not to challenge the transaction. The FTC indicated that the divergent outcome was due to the different evidence available in each jurisdiction and, in particular, the fact that concentration levels were higher in the European Union than in the United States. However, the outcome also suggests that competitor complaints played a more significant role in the EC's investigation than in that of the FTC, given the fierce opposition to the deal from Universal's competitors, particularly from the Warner Music Group and Impala (an association of independent music companies).

In order to address the Commission's concerns, Universal is understood to have committed to divest significant assets, including EMI Recording Limited (home to artists such as Coldplay, David Guetta, Pink Floyd and David Bowie), EMI's classical labels, and Mute (home to Depeche Mode, Moby and Nick Cave & the Bad Seeds). In addition, Universal has apparently committed not to include Most Favoured Nation ("MFN") clauses in its favour in any new or renegotiated contracts with digital customers for a period of ten years.[7]

Separately, the publishing activities of EMI (EMI Publishing) had been sold to a consortium led by Sony and Mubadala. That transaction was cleared after Sony offered a commitment to sell various publishing music catalogues and rights regarding 12 contemporary Anglo-American authors.[8]

Hutchison/Orange Austria

This transaction, involving the Austrian mobile telecommunications sector, concerned the acquisition by Hutchison 3G of Orange Austria and was cleared by the Commission on 12 December 2012, subject to a set of remedies designed to facilitate the entry of new players into the market.

According to the Commission's Press Release, the deal would, by making Hutchison the third largest mobile player in Austria, have reduced the number of mobile network operators active in that country from four to three. The concerns were raised despite the fact that the combined market share of the merged entity would have been only 22%. However, the Commission indicated that there were high barriers to entry, that buyer power was negligible, and that its economic analysis indicated that the parties' market shares understated their market power. The Commission was concerned that the acquisition would have had anticompetitive consequences in: (i) the wholesale market for network access and call origination, by making it more difficult for new operators to enter the market; and (ii) in the retail market where, as a result of the reduced competition, prices for mobile services to end consumers were likely to rise.

The acquisition was ultimately approved by the Commission, subject to the following package of remedies:

- The divestiture of radio spectrum and additional rights to an interested new entrant in the Austrian mobile telephony market.[9]
- Hutchison committed to provide, on agreed terms, wholesale access to its network for up to 30% of its capacity for to up to 16 mobile virtual network operators ("MVNOs") in the coming 10 years. This would enable MVNOs to offer mobile telecommunications services to end customers in Austria on competitive terms and conditions.[10]

Consistent with its previous administrative practice and with the Commission's Notice on Remedies,[11] the Commission also granted clearance to two mergers after having agreed to substantial divestitures designed to overcome significant horizontal overlaps, namely, Südickeri/EdF & Man and Outokumpu/Inoxum.

On-going Investigations

There are currently two on-going Commission Phase II investigations, where the Commission's review will continue over the course of 2013:

The proposed merger between Munksjö and Ahlstrom. Munksjö and Ahlstrom are respectively active in the production of high value-added paper products and the production of high performance labeling and processing materials. The Commission identified competition concerns in its preliminary investigation and decided to open an in-depth investigation into the transaction. Its concerns related, in particular, to the markets for pre-impregnated paper ("PRIP") and abrasive paper backings, both of which were already concentrated markets and in which the post-merger entity would have high market shares both within the EEA and worldwide. The Commission is familiar with the markets and the market players as a result of its experience with the previous acquisition of Arjowiggins by Munksjö in 2011, which allowed Munksjö to enter the PRIP business. The main issue seems to turn on the potentially narrow market definition for certain kinds of paper upon which the Commission might rely. If a narrow product market is defined, it may constrain the pricing of the merged entity.

The proposed acquisition of Mach by Syniverse. The parties act as roaming data clearing houses ("DCH") and settle the usage records of subscribers that roam on mobile operators' networks. The Commission had already dealt with the roaming data clearing sector in 2007, when it reviewed the merger between Syniverse and BSG, at the time the largest DCH in Europe. The Commission cleared this merger because Mach, which Syniverse now intends to acquire, remained on the market as a strong competitor to the merged entity. Posttransaction, it would appear that Syniverse would be the largest DCH by a very wide margin at both the worldwide and EEA levels. The Commission is concerned that customers and competitors would not be in a position to sufficiently constrain the pricing of the merged entity.
 Proposed European Commission Policy Reforms

The Commission is considering introducing a number of "good housekeeping" measures relating to its merger review process. First, the Commission is considering seeking public feedback on how it should review minority shareholder purchases. Commissioner Almunia's preference for a "selective system" of review, whereby only those transactions "which [...] can raise competition problems"[12] may fall within the Commission's review, may quell fears of excessive additional red tape, but has also raised the prospect of regulatory uncertainty.[13] Those EEA jurisdictions where acquisitions of minority shareholdings without the acquisition of de facto control might trigger a national merging (providing the EU "one-stop shop" does not apply) currently include Germany and the United Kingdom.

Second, Commissioner Almunia has also recently referred to the need to streamline the EU procedural rules on merger control, in order to "cut the red tape and find faster and simpler ways to handle the cases that clearly pose no problems to competition."[14] The details of Commissioner Almunia's intended reforms have yet to be released.

 Interaction with Other Jurisdictions

On 20 September 2012, the Commission and China signed a Memorandum of Understanding to enhance the cooperation between the EU Commission's Directorate General for Competition and China's antitrust authorities in charge of applying the Anti-Monopoly law. Under the new agreement, the parties will be able to engage in discussions on competition legislation and to share non-confidential information on competition investigations.[15]

In line with its agreement on Best Practices on Cooperation in Merger Investigations, drafted by the US-EU Merger Working Group in 2011, Commissioner Almunia has recently emphasized that the state of health of the cooperation between the EU Directorate General for Competition and the U.S. FTC and DOJ is "excellent."[16] For example, when it approved the acquisition of Goodrich by United Technologies subject to conditions on 26 July 2012, Commissioner Almunia said that "we worked in close and very effective cooperation with the US and Canadian competition authorities."[17]

 Challenges on Appeal to the General Court of the European Union

In 2007, the Belgian electricity provider, Electrabel, a subsidiary of GDF-Suez, contacted the Commission and asked if, as a result of an acquisition of shares in the Compagnie Nationale du Rhône, which had taken place in December 2003, Electrabel had obtained de facto sole control of the company, thereby arguably triggering an obligation to notify under the EUMR. The Commission held that Electrabel had indeed acquired de facto sole control and the Commission imposed a EUR 20 million fine on Electrabel. The appeal from the Commission was upheld by the General Court on 12 December 2012. The General Court indicated that: "it is only if Electrabel had not been virtually certain, in December 2003, of obtaining control at future general meetings, that there would have been [...] no infringement of the obligation not to put the transaction into effect as from that date." The arguments raised by Electrabel to the effect that there was an absence of anticompetitive effects on the market, the lack negligence on its part or the disproportionate amount of the fine, were all dismissed by the General Court.

On 28 June 2012, the Court of Justice of the European Union ("CJEU") delivered two Judgments involving the powers of the Commission to refuse access by third parties to documents on the Commission's file relating to EU merger control proceedings, namely: Commission v. Editions Odile Jacob SAS[18] and Commission v. Agrofert Holding a.s. The Commission justified its refusal to both Odile Jacob and Agrofert on certain exceptions to the right of access contained in the EU Regulation regarding public access, in particular in the protection of commercial interests and the protection of the purpose of investigations. Challenged before the General Court, the Commission's Decision was quashed. The General Court held that the Commission had not sufficiently motivated in its Decision, in a concrete and individualized manner, that the documents in question could benefit from the cited exceptions. The Commission appealed the ruling before the CJEU. The CJEU overturned the ruling of the General Court, finding in favour of the Commission and holding that the General Court: "ought to have acknowledged the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings in the course of merger control proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in those proceedings." The CJEU, furthermore, recognised the right for the Commission to refuse access to documents relating to merger proceedings without having had the opportunity of first carrying out a concrete and individual examination of those documents.

 Merger Control in the EU Member States

Transactions not benefitting from the "one-stop shop" regime provided under the EU merger regulation can be reviewed by the Competition Authorities of the affected Member States. Merger enforcement at the Member State level has been quite active over the past year. Some of the highlights during this period include:

• In May 2012, the U.K. government enacted the Enterprise and Regulatory Reform Bill, which substantially reform the competition regime in the U.K., creating a new enforcer called the Competition and Markets Authority ("CMA"). The Bill does not dramatically amend the U.K.'s voluntary merger control regime, or the U.K.'s substantive competition laws, but the CMA will benefit from new and broader powers. Furthermore, with the objective of enhancing cooperation and interaction between the notifying parties and the CMA, the Bill introduced a five working day period after the initial 40 working day review period in which undertakings can be offered in lieu of the opening of a Phase II review. It is then left open to the CMA to decide on whether or not to accept the proposed procedural reforms.[19]

• The Spanish Competition Authority (the Comisión Nacional de la Competencia or "CNC") opened infringement proceedings on 7 June 2012 against Mediaset España Comunicación, S.A. (formerly Telecinco), for failing to comply with commitments approved in connection with the Telecinco-Cuatro merger. The merger between the two corporations had only been approved after a Phase II investigation in 2010. According to the CNC, Mediaset had not maintained functional separation among the advertising managing societies of the pre-merger entities and that Mediaset had "unjustifiably delayed waiving its pre-emptive rights to acquire audiovisual content and had also procrastinated [sic] in granting option rights for adjustments to the term of contracts in force." Furthermore, the CNC found that Mediaset included prohibited clauses in certain contracts for the acquisition of audiovisual content." (For an update on the proceedings click here.) A fine of €819,000 was imposed for similar reasons on 21 December 2012 on Redsys, a payment processing firm. In its Decision, the Spanish Competition Authority considered that, by not maintaining functional separation between two of its subsidiaries, Redsys had not respected the commitments agreed in the March 2011 clearance of its acquisition of rival firm Redy.
• The fines imposed in calendar year 2012 illustrate how National Competition Authorities across the European Union will not hesitate to sanction companies not respecting the applicable gun-jumping obligations. In addition to the €20 million fine upheld by the CJEU (see above), in 2012 both the Spanish and French Competition Authorities imposed fines of respectively €286,000 and €392,000 on companies such as Colruyt for not notifying transactions that arguably met the respective national "standstill" standards.

• During 2012, the German Federal Cartel Office (the "Bundeskartellamt") also confirmed its reputation as one of the most interventionist merger authorities in Europe by holding that the creation of JVs outside Germany must also be notified in Germany if the revenues of the parent companies in Germany exceed the applicable threshold and the initiation of German activities is easily foreseeable.

• On 29 March 2012, the Bundeskartellamt published new guidance on substantive merger control. The new Guidance and accompanying legislation will replace the market dominance test provided for in Section 36 of the German Act Against Restraint on Competition by the "significant impediment to effective competition" ("SIEC") test, also used in E.U. merger control.

• The Bundeskartellamt also prohibited two transactions during the year 2012. These occurred in the respective fields of aerated concrete and tampons viscose fibers.

MERGER CONTROL DEVELOPMENTS OUTSIDE THE UNITED STATES AND THE EUROPEAN UNION

China

On 13 December 2011, the Chinese Ministry of Commerce ("MOFCOM") announced that it had passed interim measures for investigation and punishing entities in breach of the Chinese obligation to file certain transactions. In particular, MOFCOM indicated that those violating the rule (i.e., the Anti-monopoly Law and the Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings) could face legal liabilities, including the prohibition of the merger, disposing of equities or assets within a prescribed time limit or receiving a fine (up to RMB 500,000–approximately USD 80,000).

In addition, MOFCOM has introduced a new merger filing form. The revised notification form is more data and document intensive, including a requirement to submit the board documents regarding a notified transaction, even for those acquisitions that do not appear to raise competition concerns. However, MOFCOM is said to be considering the introduction of a fast-track procedure for transactions raising no competition issues.[20]

In 2012, MOFCOM imposed behavioral remedies in a number of transactions:

• In the conditional clearance on 9 February 2012 of a joint venture between Henkel Hong Kong Holdings Co. Ltd. and Tiande Chemical Holdings Co., Ltd., MOFCOM found that that the concentration might restrict competition in an alleged cyanoacrylate monomer market. The commitments imposed include an obligation to supply ethyl cyanoacrylate to all downstream customers, an annual reporting obligation due to MOFCOM regarding the fulfillment of this supply obligation, and the appointment of an independent entity to monitor the fulfillment of these commitments.

• The acquisition by Wal-Mart Stores Inc. of a controlling stake in Newheight Holdings Limited, the owner of Yihaodian, the largest online supermarket in China.

• The creation of a joint venture between semiconductor intellectual property supplier ARM and two providers of security solutions--Giesecke & Devrient of Germany and Gemalto of the Netherlands.

The acceptance by MOFCOM of purely behavioral (i.e., conduct-based) remedies contrast with the preference of the U.S. agencies and E.U. competition authorities for structural remedies (and, in particular, divestitures). Furthermore, these conduct-based remedies contrast with the imposition of structural remedies in MOFCOM's clearance of the acquisition by the United Technologies Corporation of Goodrich Corporation, on 15 June 2012. As discussed above, this latter decision is also noteworthy in that MOFCOM adopted its decision earlier than other major competition authorities, including in the U.S. and E.U.[22] Finally, MOFCOM required a mixture of divestitures and behavioral remedies when granting conditional clearance, on 2 March 2012, for the purchase of Viviti by Western Digital (manufacturer of hard drives). Both the European Commission and the U.S.’ FTC also cleared the acquisition subject to conditions.[23]

Brazil

A new Brazilian Competition Act (Law 12,529) came into force on 30 May 2012. Under the new Act, a single independent authority, the Conselho Administrativo de Defesa Econômica (known as CADE), will be entrusted with the tasks of investigating anti-competitive conduct, analysing merger filings and adopting final decisions.[24]

Other changes in Brazil's merger control regulations include: the repeal of the 20% market share threshold; and the reduction of the review period to eight months (with a possible maximum three-month extension).

India’s CCI Revises Its Merger Control Regulations

In February 2012, the Competition Commission of India ("CCI") amended and simplified its merger control regulations, thereby introducing "The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012." The main objective of the amendments was to introduce more certainty into the regime. The principal modifications introduced by the CCI are the following:

• The threshold for the percentage of shares in a company that may trigger a filing for a notifiable acquisition has been increased from 15% to 25%.

• New filing forms are being introduced: Form "I" should be used for non-problematic mergers, whereas Form "II" is for those mergers raising more complex issues, the review of which requires a significant amount of information.[25]

• Filing fees have been increased: 1 million rupees (approximately USD 20,000) for Form I and 4 million rupees for Form II (approximately USD 80,000).

As discussed above, from an international cooperation perspective, the US’ FTC and the Indian CCI have signed a Memorandum of Understanding to establish stronger links between the two authorities.
Hong Kong Enacts Its First Cross-Sector Competition Law

In June 2012, Hong Kong’s Legislative Council passed the Competition Ordinance (the “Ordinance”). The Ordinance introduces the first "horizontal" (i.e., economy-wide) prohibitions of anticompetitive agreements and abusive conduct in Hong Kong. Its provisions on merger control, the date of whose entry into force has not yet been decided, and which might be delayed to late 2013 or even to 2014, will initially apply solely to the telecommunications sector. The government has, however, stated that it eventually intends to introduce merger control rules for all sectors.

[2] As the Acting AAG noted, the investigation involved Google’s acquisition of Motorola’s patent portfolio, which included patents that Motorola had committed to license through its participation in certain standard-setting organizations.
[3] The DOJ decided not to challenge the transaction, but reserved the ability to challenge future exercises of the relevant patent ownership rights. See U.S. Google Statement (Division’s conclusion as to Google/Motorola Mobility "limited to the transfer of ownership rights and not the exercise of those transferred rights"); EC Google Statement ("Today's decision is without prejudice to potential antitrust problems related to the use of standard essential patents in the market in general.").
[5] The Commission’s prohibition decision has been appealed by Deutsche Börse (refer to Case T-173/12 – Action brought on 12 April 2012).
[7] According to the Commission (which had treated MFN As anticompetitive in certain industries such as ebooks and energy) this behavioral commitment will “allow Universal's competitors to negotiate freely with digital customers and further level the playing field between these competitors and Universal.”
[9] The potential new mobile network operator will have the right to acquire spectrum not only from Hutchison but also additional spectrum at an auction planned in 2013 by the Austrian sector-specific regulator. The latter intends to reserve spectrum for a new entrant, in order to enable such an operator to build up a physical network for mobile telecommunication services in Austria.
[10] MVNOs generally need to enter into agreements with a mobile network operator in order to be able to provide mobile telephony services to their customers. It should also be stressed that Hutchison gave an up-front commitment that the acquisition of Orange Austria would not be completed before it had entered into such a wholesale access agreement with at least one MVNO.
[19] The Bill also dealt with antitrust and criminal cartel provisions.
[22] Please see EU developments above.
[23] The EU required divestment of production assets for 3.5-inch hard disk drives, including a production plant. The FTC reached a settlement on its competitive concerns, which included the sale of Western Digital’s assets used to manufacture and sell desktop HDDs to Toshiba.
[24] Before that, there were three entities—the Secretary for Economic Monitoring of the Ministry for Finance, the Secretary for Economic Law of the Ministry for Justice and the CADE—involvement in merger reviews.
[25] The use of Form II is compulsory where: (a) the parties to the combination are engaged in (potentially) horizontally overlapping activities, and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market; or (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, and their individual or combined market share is more than 25% of the relevant product or service market.

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